

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

No. 77-1255

In the
UNITED STATES COURT OF APPEALS
For the Second Circuit

UNITED STATES OF AMERICA,
Appellee

v.

IRVIN V. IVERSEN,
Appellant

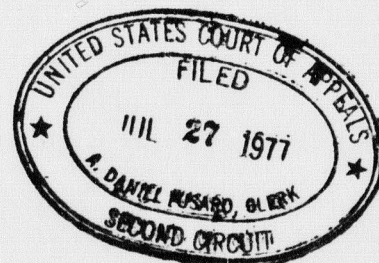
On Appeal from the United States
District Court for the Western District
of New York

APPELLANT'S BRIEF & APPENDIX

DOYLE, DIEBOLD, BERMINGHAM,
GORMAN & BROWN
Attorneys for Defendant-Appellant
Office & Post Office Address
1340 Statler Hilton Hotel
Buffalo, New York 14202

MICHAEL J. BROWN, ESQ., OF COUNSEL

June 1977



PAGINATION AS IN ORIGINAL COPY

In the
UNITED STATES COURT OF APPEALS
For the Second Circuit

UNITED STATES OF AMERICA,
Appellee

v.

IRVIN V. IVERSEN,
Appellant

On Appeal from the United States
District Court for the Western District
of New York

APPELLANT'S BRIEF & APPENDIX

DOYLE, DIEBOLD, BERMINGHAM,
GORMAN & BROWN
Attorneys for Defendant-Appellant
Office & Post Office Address
1340 Statler Hilton Hotel
Buffalo, New York 14202

MICHAEL J. BROWN, ESQ., OF COUNSEL

June 1977

TABLE OF CONTENTS

	<u>Page</u>
Table of Cases and Authorities.	<i>ii</i>
Statute Involved.	<i>iv</i>
Questions Presented	<i>v</i>
Preliminary Statement	1
Statement of Facts.	2
Background.	2
Chronology of Events.	5
Point I	12
The Government Failed to Prove Beyond A Reasonable Doubt that Iversen's Failure to File was Willful, as a Matter of Law.	
Point II	17
The Trial Court Erroneously Charged the Jury with respect to its Consid- eration of Iversen's Negligence in Determining Willfulness.	
Point III	25
The Court's Three Month Prison Sen- tence was Arbitrary, Capricious and an Abuse of Discretion and Deprived Irvin V. Iversen of Due Process and Equal Protection of the Law.	
Conclusion.	31

TABLE OF CASES AND AUTHORITIES

	<u>Pages</u>
<i>Dorszynski v. United States</i> , 418 U.S. 424 (1973) . . .	30
<i>Sansone v. United States</i> , 380 U.S. 343 (1965).	20
<i>Spies v. United States</i> , 317 U.S. 492 (1943	20
<i>United States v. Baker</i> , 487 F.2d 360 (2d Cir. 1973). .	29
<i>United States v. Bengimina</i> , 499 F.2d 117 (8th Cir. 1974).	20-21
<i>United States v. Berg</i> , 75-1 USTC 9198 (1974)	21
<i>United States v. Bishop</i> , 412 U.S. 346, 361 (1973). . .	19, 20
<i>United States v. Brown</i> , 470 F.2d 285 (2d Cir. 1972). .	29
<i>United States v. Douglass</i> , 476 F.2d 260 (5th Cir. 1973).	23
<i>United States v. Holder</i> , 412 F.2d 212 (2d Cir. 1969). .	29
<i>United States v. Murdock</i> , 290 U.S. 389 (1933).	20, 24
<i>United States v. Platt</i> , 435 F.2d 789 (2d Cir. 1970). .	13, 24
<i>United States v. Pohlman</i> , 522 F.2d 974, 980 (8th Cir. 1974).	24
<i>United States v. Pomponio</i> , U.S. , 97 S.Ct. 22 (1976)	13, 16, 20, 23
<i>United States v. Schipani</i> , 362 F.2d 825 (2d. Cir. 1966).	13
<i>United States v. Schwarz</i> , 500 F.2d 1350 (2d. Cir. 1974).	29
<i>Williams v. New York</i> , 377 U.S. 241, 247 (1949)	27
<i>Woosley v. United States</i> , 428 F.2d 139 (85h Cir. 1973).	30

STATUTE CITED

26 U.S.C. §7203	1, 15, 19, 21, 27
---------------------------	----------------------

OTHER AUTHORITIES CITED

American Bar Association Standards Relating to Sentencing Alternatives and Procedures (Standard 2.2) 1968.	26
American Bar Association Standards Relating to Appellate Review of Sentences, 1.1(a).	30

STATUTE INVOLVED

26 U.S.C. §7203. Willful failure to file return, supply information, or pay tax

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority or section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

QUESTIONS PRESENTED

1. Whether the Government failed to prove beyond a reasonable doubt that Iversen's failure to file was willful, as a matter of law.
2. Whether the trial Court erroneously charged the jury with respect to its consideration of Iversen's negligence in determining willfulness.
3. Whether the Court's three month prison sentence was arbitrary, capricious and an abuse of discretion and deprived Irvin V. Iversen of due process and equal protection of the law.

PRELIMINARY STATEMENT

On April 26, 1976, an information was filed in the United States District Court for the Western District of New York charging Irvin V. Iversen with three counts of having failed to file a personal income tax return for the years 1970, 1971 and 1972, in violation of §7203 of Title 26, U.S.C.

On December 9, 1976, the jury trial commenced in that Court (Elfvin, J.) and was concluded on December 15, 1976, upon the return of a verdict of guilty on each count.

On February 28, 1977, the Court denied Iversen's motion pursuant to Rule 29 of the Federal Rules of Criminal Procedure, and sentenced him to the custody of the Attorney General for a period of 90 days, concurrent on each count. A notice of appeal was duly filed on March 1, 1977.

On April 14, 1977, the Court denied Iversen's motion for reduction of sentence.

Appellant is currently at liberty in his own recognition, pending determination of this appeal.

STATEMENT OF FACTS

Although the events covered by this indictment and the evidence at trial span the period from 1966 up until the date of the trial itself, it is the Government's position that:

"[B]etween April 1972 when he filled out the [1971] returns and didn't file them until he took steps to hire a professional accountant [September 1973], he [Iversen] was willful in his non-filing" (419)¹

In order to understand that position, as well as Iversen's position that the verdict was against the weight of the evidence and that the charge to the jury with respect to willfulness was erroneous, it is necessary to know the man and the events which preceded and led to his indictment.

Background

Following four years in the United States Air Force and undergraduate work at Houghton College, Irvin V. Iversen decided upon a career in law and entered Syracuse University College of Law. He completed his studies in 1960 and was admitted to practice in 1962. At that time he was employed on the trial staff of the All-State Insurance Company, in Syracuse, New York (242-244).

In 1963, he went to work in a Buffalo, New York, law firm, and in 1964, he decided to strike out on his own (244, 254). After struggling for a year on his own, he entered a

¹Refers to transcript of trial.

partnership with Jack Morris and Gerald Greenan. It was at this point that his troubles began. This association lasted only until March 1968, when Iversen left the partnership to go on his own again (256-257). During this time, beginning with the calendar year 1966, he failed to file his income tax returns. What precipitated this was the failure of the partnership's accountant to complete the necessary work on the partnership return (298-299). This continued to be a problem even after the breakup of the partnership due to the fact Iversen continued to work on files opened during the existence of the partnership (46, 257).

Since Iversen and his first wife, Esther, were originally from Hancock, New York, they decided in 1970 he would open an office there and gradually phase out his practice in Buffalo (268). A house was purchased in Hancock, and eventually, in May 1971, a law office was opened (266, 308). In order to be with his wife and five children and in order to handle the affairs of clients both in Hancock and Buffalo, Iversen commuted the 255 mile distance between the two offices twice weekly during the period covered by this indictment (266-268).

At the time he opened his office in Hancock, Iversen was working 70 to 80 hours per week in his Buffalo office and was also engaged in numerous church, charitable and civic activities (273-274).

He was Choir Director at the Elma Baptist Church in Elma, New York, which required his presence at the church every

Sunday for five hours and on Monday evenings for rehearsal.

Membership on the Board of Directors of the Buffalo Bible Institute required one evening a week and an occasional meeting during the day. He was also in charge of the Summer Music Program at the Institute which necessitated his attending special meetings every evening for three weeks each summer.

For a period of 6 to 7 years during this time he was a Director and Chairman of the Board of the Erie County Child Evangelism Fellowship. He was responsible for the entire operation of that organization, which consumed at least five hours a week. In addition, one weekend a month was spent working on the State Board of the Child Evangelism Fellowship.

Other activities included Camp Cherith of Western New York, a religious group for girls requiring him to meet once a month; and his involvement with the Ellicott Center in the core area of Buffalo. This latter work called for two to three hours per week, exclusive of the legal work done on behalf of the organization.

In addition to attempting to operate two law offices separated by 255 miles, spend time with his family and concentrate on a wide variety of church, charitable and civic activities, Iversen was--as the trial judge put it--"grossly inattentive to record keeping" (S. 10)². Although he had two fully staffed offices and from 600 to 1000 clients, his only method of bookkeeping was the records from his checking accounts. Fees

²Refers to transcript of sentencing (February 28, 1977).

and reimbursement of expenses were deposited in these accounts and all expenses, both personal and business, were paid from these accounts without recording clients' names, or distinguishing the nature of the expense (221, 224, 272, 437). Although he paid withholding taxes for his employees in a timely fashion, he had a great deal of difficulty in knowing which forms to use and how to use them (238-239). On more than one occasion he paid too much in withholding taxes (443).

Finally, Iversen had difficulty in meeting personal expenses. He described himself as living "hand-to-mouth" due to expenses incurred in raising five children, purchasing the home in Hancock, purchasing automobiles, maintaining a residence in Buffalo apart from his family in Hancock, purchasing stocks, taking vacations and also due to the eventual divorce from his first wife and his subsequent remarriage (78, 94-96, 98, 110-111).

Chronology of Events

It is against this backdrop that the following events occurred.

1970

Up to and including this period, Iversen was aware he had failed to file returns for 1966 through 1969. Applications for extensions of time had been made. It was during this year that he first spoke about his returns with Henry Schroeder, the accountant for the partnership of Morris, Grennan & Iversen (306-307).

Early 1971

On a visit to a Certified Public Accountant on behalf of a client, Iversen discussed the fact that he had not filed returns. The accountant told him to get his records together and he would prepare the returns (245-253). Again, during this year he also discussed the matter with Schroeder (306-307). However, he was unable to put his records in order.

April 1971

An application for extension of time to file was denied (269-270). It was at this time that he decided to hire his oldest daughter to work on his records so that he could file his returns (282).

June 1, 1971

Following her graduation from high school, his daughter began working on his records (335).

Early 1972

Again, he discussed the problem of his returns with an accountant (247, 253).

April 1972

Using the information supplied by his daughter, Iversen made out returns for 1969, 1970 and 1971. However, because he believed the information to be inaccurate he did not file them (53, 121).

It was subsequently determined that these returns were inaccurate in that the adjusted gross income reported on these

returns was larger than the amount on those finally filed (90-91, 287).

November 1972

Iversen's secretary, hired a month earlier, discovered he had not filed his returns. She began to "nag" him about it but they could never seem to find enough time to do it (217).

"On more than one occasion we would say, 'this day you don't have any appointments, we are going to shut off the phone, you are going to work on them.' He would get the papers out, the phone would ring, it would be a client needing to talk to him, and he would say, 'Okay,' and they would talk, and that would be about it, the day would be shot again." (226, 381).

December 1972

Iversen and his first wife, Esther, were divorced and he married his present wife, Virginia (36).

April 1973

Several withholding tax forms were improperly filed and erroneously filled out. Thus, an IRS agent visited the office to confer with Iversen. Finding records in poor shape, the agent spent the entire morning with Iversen, helping him fill out forms and sort through payroll records (354-357, 443).

As the agent was preparing to leave, Iversen voluntarily disclosed that he was several years in arrears on personal income tax returns (354-357). Shortly thereafter [April 27, 1973] he was visited by an IRS agent inquiring about his failure to file returns for 1970, 1971 and 1972 (374).

May 1, 1973

Following the agent's visit, Iversen wrote to him, explaining that he would try to have the returns in within three weeks (26-27, 373-375).

September 1973

Patricia Klein was hired to set up a bookkeeping system and, working back from 1973, gather the information necessary to file the delinquent returns (219-220, 354). Earlier that month, he had interviewed accountants with a view to hiring them for the same purpose (233-235). Two months later [November 1973] he spoke about his returns with John Gordon, who was planning to open an H&R Block office in Hancock, New York (305, 313). Shortly thereafter he turned over all his papers and records to Gordon and his returns were finally completed (313-330).

February 26, 1974

Revenue Officer Paul Rich of the Internal Revenue Service called Iversen's office regarding the 1970, 1971 and 1972 returns (21).

April 4, 1974

Special Agent Anthony R. Gagliardi met with Iversen at the latter's office and informed him he was conducting an investigation into criminal violations. After being advised of his Fifth and Sixth Amendment rights, Iversen voluntarily submitted to questioning (68-69, 360). He permitted Gagliardi to

list his credit cards; gave him a list of banks with which he dealt; gave him a list of his stocks, bonds and securities; and told him about "cash on hand" (79-80). He also told Gagliardi he had not filed for the years 1969 through 1972, that he intended to file and gave his reasons for not filing (33-34).

Gagliardi stated at trial that Iversen was cooperative and answered all questions truthfully (74, 86-88). Iversen was unable to turn over his records because they were in Hancock, New York (37). On April 18, 1974, Iversen wrote Gagliardi, informing him that he would send his records in the early part of May (106-108).

It was sometime after this meeting that Patricia Klein informed Iversen that because of the state of his records, she would be unable to complete the work for his 1973 returns (222).

May 6, 1974

Special Agent Gagliardi was informed that Iversen had retained F. Bernard Hamsher to represent him (38, 119). On June 14, 1974, Hamsher met with Gagliardi and gave him the 1968 and 1969 returns (38).

July 16, 1974

The 1970 and 1971 returns were filed.

September 24, 1974

On this date, Iversen's attorney gave Gagliardi all the records and papers. The materials consisted of various cancelled checks, schedules, applications for extension of time to

file returns and the returns for 1969, 1970 and 1971, as well as other records and papers. Because of the large amount of material which Gagliardi said would take days to examine, he asked for, and obtained, permission to take the materials to his office (42-45, 84-85, 118-119).

October 16, 1974

Iversen filed his 1972 return (50-51).

April 26, 1974

On this date, the Government filed an information, charging failure to file the 1970, 1971 and 1972 income tax returns, one and one-half years after filing the 1972 return and one year and nine months after filing the 1970 and 1971 returns.

In all his conversations with his secretary, accountants, revenue agents and Special Agents of the Internal Revenue Service and in his testimony, Iversen maintained that he knew he was required to file (32, 54, 261, 380); that he knew he had not filed (33, 247-248, 380); that he always intended to file (102, 122, 247-248, 295, 306-307, 380); and that his reasons for not filing were (1) inadequate records, and in some instances, the total lack of records; (2) the management of the two law offices separated by 255 miles; (3) concern for the matters he was handling on behalf of his clients; (4) devotion of his free time to church, charitable and civic projects and organizations; (5) his responsibility to his family; (6) and the failure of his

partnership to supply the partnership returns (33-34, 261,
270, 273, 296, 298-299, 361, 362).

POINT I

THE GOVERNMENT FAILED TO PROVE
BEYOND A REASONABLE DOUBT THAT
IVERSEN'S FAILURE TO FILE WAS
WILLFUL, AS A MATTER OF LAW.

After denying Iversen's motion for a judgment of acquittal following the verdict, the trial court made the following statement:

"I go along fairly much with the idea that much of this trouble, this particular omission, these omissions for these years of filing these tax returns, wasn't due to any degree to your feeling that you intended not to file the returns at some point, that you intended not to pay the money that was due the Federal Government. I think to a large degree it was due to procrastination, which is something that many people are saddled with, and it doesn't quite fall within the realm of criminality or criminal intent. I think probably you might have found yourself a little out of funds. I know from the record that you were certainly grossly inattentive to record keeping, and this is not something that just comes out of your mouth, but obviously when you tried to employ your daughter and your secretary to make some sense out of the so-called records, neither one was able to do it, and it took your brother-in-law, Mr. Gordon, some time to work through them to be able to get your returns filed." (S.9-10).

Thus, the conviction of Irvin V. Iversen presents a very serious question for this Court's consideration. The most careful examination of the record below fails to yield any

evidence showing that Iversen's failure to file his 1970, 1971 and 1972 income tax returns was "willful" as that term has been defined and construed by this Court and the United States Supreme Court. *United States v. Pomponio*, U.S. , 97 S.Ct. 22 (1976); *United States v. Platt*, 435 F.2d 789 (2d Cir. 1970); *United States v. Schipani*, 362 F.2d 825 (2d Cir. 1966). All his actions demonstrate clearly that he never formed the specific intent to violate the statute.

Irvin V. Iversen was a poor businessman and, perhaps, even incompetent as an office manager. He had no concept of even the basic procedures in bookkeeping sufficient to show income and its sources; to show the difference between income and the reimbursement of expenses; to show the difference between business and personal expenses. To find him guilty of willfully violating the statute, one would have to say that he set out in 1966 on a course of conduct designed to prevent his compliance with the income tax laws. The Government could not, and did not, advance such an argument.

Nor can it be argued that once his records were in such a state of disorganization as to make filing the returns extremely difficult or impossible, that he formed the requisite intent. It was those same traits which created the situation in the first place which prevented him from extricating himself until driven to it by the exigencies of the situation. As the evidence demonstrates, he was not orderly in his personal or professional affairs. In addition to that he was, as the trial

judge noted, guilty of procrastination. From time to time, as the subject came up either directly or indirectly he would discuss the problem and, in some cases, attempt to correct it. For example, he hired his daughter and Patricia Klein for the express purpose of putting his records in order. When he was with the accountant on tax matters for his clients, he discussed the matter with him. When the IRS agent visited him to help him with his employee withholding forms, he voluntarily disclosed the situation to him.

At no time did he ever deny his failure to file. At no time did he attempt to hide or falsify his income or his records. At no time did he refuse or fail to acknowledge his tax liability.

The record speaks for itself. Beginning in 1966, Irvin V. Iversen blundered and stumbled his way inevitably toward a collision with the IRS and professional disaster.

The Government urged that Irvin Iversen, prior to being contacted by the Internal Revenue Service about his failure to file, "took no serious action, no honest effort to get his returns in." (469). It is submitted that Irvin Iversen did all that Irvin Iversen was capable of doing.

Before being contacted by the IRS about his returns, he spoke with two Certified Public Accountants about doing his returns on at least four different occasions. Each time the answer was the same: "Put your records in order and bring them in".

Before being contacted by the IRS, he hired his daughter to help him put his records in order, among other duties. The Government urges that she was a "gopher"--running errands--as well. This does not negate the fact he did get enough information together from her to make the 1969, 1970 and 1971 returns, albeit inaccurately.

Before being contacted by the IRS, he made out his 1969, 1970 and 1971 returns. It was only because he believed them to be inaccurate, a fact later confirmed by the IRS, that he did not file them.

Before being contacted by the IRS, his secretary "nagged" him about his returns and they made many vain attempts to get the information together.

And perhaps most important of all, before being contacted by the IRS, he voluntarily disclosed to an IRS agent, who was assisting him with the forms for his employee withholding taxes, that he had not filed his personal income tax returns for several years. It was only after this that he was contacted by the IRS with respect to his failure to file.

These facts stand uncontroverted and uncontradicted. To permit the verdict here to stand in the face of the requirement that the failure to file be "willful" would constitute a gross miscarriage of justice. Exhaustive research has failed to disclose any case where this Court, or any other, has permitted a conviction under §7203 in a similar situation.

These facts and the presumption of innocence, unrebutted,

compel the conclusion that Iversen's failure to file was *not* done "'intentionally and with the specific intent to do something which the law forbids. . .[or] with [the] bad purpose either to disobey or disregard the law'". *United States v. Pomponio*, 97 S.Ct., *supra*, at 23.

For these reasons, Iversen's conviction on each count must be reversed and the indictment should be dismissed.

POINT II

THE TRIAL COURT ERRONEOUSLY CHARGED
THE JURY WITH RESPECT TO ITS CON-
SIDERATION OF IVERSEN'S NEGLIGENCE
IN DETERMINING WILLFULNESS.

The trial Court committed prejudicial error when it charged the jury, over defense counsel's objection, that negligence would not negate willfulness in this case.

Prior to summations, defense counsel requested the Court to charge the jury as follows with respect to negligence:

"In a prosecution under this Section, the Government must establish beyond a reasonable doubt that defendant was required to file a return, that he knew he was so required, and that he willfully or purposefully, as distinguished from inadvertently, negligently or mistakenly, failed to file such a return. (*U.S. v. Matosky*, 421 F.2d 410).

* * *

If you find the defendant, IRVIN V. IVERSEN, was extremely negligent of any responsibility involving paperwork or record keeping, you are entitled to find the Government had failed to prove beyond a reasonable doubt that the defendant willfully filed his income tax returns for three consecutive years. (*U.S. v. Berg*, 1974, Dcsd. 75-1 USTC Section 9198).

* * *

You cannot convict of any of the offenses, if the failure to file was by reason of carelessness, inadvertence, negligence, or even gross negligence." ³

³Defendant's Request to Charge, at Appendix, A-5.

The Court refused to so charge, stating:

"No, my basis for not charging that is that I don't find his negligence involving the record keeping or paperwork to be an excuse for non-filing. The obligation to file returns carries with it inherently the obligation to keep records directly or indirectly to enable the returns to be filed." (457).

The defense took exception to this interpretation by the Court and its refusal to charge as requested.

In its charge, the Court instructed the jury with respect to negligence as follows:

"The term 'willfully' used in connection with this offense means voluntarily, purposefully, deliberately and intentionally, as distinguished from accidentally, inadvertently or negligently. Mere negligence, even gross negligence, is not sufficient to constitute willfulness under the criminal law. The failure to make a timely return is willful if the defendant's failure to act was voluntary and purposeful, and with the specific intent to violate a known legal duty, namely, the law which requires him to file a timely return which disclosed to the Government facts material to the determination of the individual tax liability." (528-529).

Had the Court concluded its discussion of negligence at this point, there would have been no error. However, any chance Iversen had of obtaining a just verdict was lost when the Court continued:

"Now, I must hedge somewhat on my reference to negligence. Negligence *per se* is no defense. The man must be found to have been acting voluntarily and willfully and intentionally

but if he were negligent, as the proof might show in this case, in keeping proper books or keeping a proper organization of books, if you deem that to be negligence, that area of negligence would not be sufficient to negate the willfulness and intention that the law requires for criminality." (529).

The confusion in the minds of the jurors was evident when they returned for further instructions (557-558). However, the Court compounded its error by further explaining the term "willfulness". (561-565).

The effect of this charge was to completely vitiate the particular *mens rea* requirement of §7203 by permitting Iversen to be found guilty when he lacked the specific intent this Court and the Supreme Court have determined is necessary for conviction. To put it more directly, the Court effectively directed a verdict of guilty.

In *United States v. Bishop*, 412 U.S. 346, 361 (1973), the Court stated that consistent interpretations of "willfully" have required the element of *mens rea* because this:

"[I]mplements the pervasive intent of Congress to construct penalties that separate the *purposeful tax violator* from the well-meaning, but easily confused, mass of taxpayers."
(Emphasis added).

It was crucial in this case that the concept of "purposeful tax violator" and the precise boundaries of the term "willfully" be clearly established because the guilt or innocence of the defendant, and the subsequent imposition of criminal penalties, rested

solely on the definition of that word.

Negligence as to records and financial affairs, which the Court held here could co-exist with the requisite specific intent, is clearly at odds with the affirmative type of intent which the Supreme Court has suggested is the proper interpretation of "willfully". *United States v. Pomponio, supra*; *United States v. Bishop, supra*; *Sansone v. United States*, 380 U.S. 343 (1965); *Spies v. United States*, 317 U.S. 492 (1943); *United States v. Murdock*, 290 U.S. 389 (1933).

While it may be said that "the obligation to file returns carries with it inherently the obligation to keep records directly or indirectly to enable the returns to be filed" (457), there is no support for the implied correlative idea that negligent bookkeeping could be the source of criminal behavior in and of itself. The "willfulness" required by the statute must be directed at the law itself. There must be a "specific intent to do something which the law forbids", *United States v. Pomponio, supra*, which was clearly lacking here and a finding of which was never demanded of the jury. Record keeping is clearly not the equivalent of filing returns. Congress punished the "willful failure to file" in a timely fashion; not negligent bookkeeping which results in an inability to file on time.

A situation analogous to ours arose in *United States v. Bengimina*, 499 F.2d 117 (8th Cir. 1974), where the Court specifically rejected instructions that permitted a finding of guilt when the defendant acted with a "careless or reckless disregard

of the law". The Court stated that "while 'willful' is not considered the opposite of 'careless' or 'reckless', the latter do give a contrary connotation to 'willful' when used in conjunction with negligence, inadvertence or mistake." (499 F.2d at 120).

It is this "contrary connotation which the Court failed to point out, and upon which Iversen relied in this case. Even had the jury accepted Iversen's arguments throughout the trial, they were compelled to find him guilty under such an instruction.

The importance of negligence is evident in *United States v. Berg*, 75-1 USTC 9198 (1974), where the evidence clearly established that the defendant was "extremely neglectful" of responsibility concerned with book work and record keeping. In that case, none of the three income tax returns were filed on time. Each was subsequently found; one under the floor mat of defendant's car, one in a wicker basket belonging to defendant's mother-in-law, and one scattered among defendant's papers at home. Given this clearly negligent attitude of the defendant, the Court nonetheless found him innocent of any violation of §7203. The Court held that the Government had failed to prove beyond a reasonable doubt that the defendant acted intentionally and deliberately in his failure to file. Thus, while his negligence did not automatically negate "willfulness", it clearly was an important factor to be considered in ascertaining his intent at a specific time.

Examples of negligence are factors of substantial importance for the jury's determination of "willfulness" because while they are not mutually exclusive, both demonstrate aspects of the defendant's state of mind. In our case, the Court's instruction effectively eliminated negligence as a factor to be considered by the jury in determining willfulness.

Irvin Iversen lacked the specific intent to violate the statute. He was, however, extremely negligent in his book-keeping habits and in his procrastination. Such negligence was based neither on intention nor deliberation; but rather on his inability to use proper care and devote sufficient attention to financial matters. His situation is best characterized as one of impossibility. The total lack of organization of his records prevented him from obtaining the information necessary to determine gross income, as well as preventing him from determining business deductions.

It is also extremely significant that the Court failed to define "negligence" or "negligence *per se*". In part of his comments to the jury, he stated:

"The term 'willfully' used in connection with this offense means voluntarily, purposely, deliberately and intentionally, as distinguished from accidentally, inadvertently or negligently. Mere negligence, even gross negligence, is not sufficient to constitute willfulness." (528)

Seemingly, the Court intended to distinguish negligence from willfulness. However, in a subsequent statement, the Court

reneged on the issue of negligence. A jury, in responding to his remark, "negligence *per se* is no defense", would have little knowledge of what meaning was intended.

"Negligence *per se*" is a term of art, not a uniformly known expression. The jury would most likely conclude from that statement that if Iversen's negligence was the cause of his failure to file, it was not to be examined even though it went directly to the issue of "willfulness". This is clearly erroneous.

In *United States v. Douglass*, 476 F.2d 260 (5th Cir. 1973), the Court held that willfulness required:

"[T]hat the act be purposefully done, with an awareness of the action and not just negligently or inadvertently
* * * This concept is. . .one which excuses a *negligent* failure to file the information required by statute."
(476 F.2d at 263).

Defendant's negligence goes to the heart of the issue of "willfulness" and if sufficient, as here, may serve to negate "willfulness" entirely.

In *Pomponio*, the Court accepted the trial court's instructions. These included the words "with the specific intent to do something which the law forbids, that is to say, with the bad purpose either to disobey or disregard the law." (97 S.Ct. at 23). In our case, the Court gives numerous examples whereby the jury might find the defendant to possess the requisite intent if, at any time, he failed to comply with the law regardless of the fact he might have filed his returns or that his failure to file at the proper time was not willful. The only exemptions the

Court allows are for "mistake, accident or other innocent reason" (531). The Court in *Murdock* clearly rejects this type of reasoning.

"Congress did not intend that a person, by reason of a *bona fide* misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct." (290 U.S. 389, 396; emphasis added).

This Circuit has termed an instruction "entirely right" which defines "willful failure" as a "conscious, deliberate, purposeful failure". *United States v. Platt*, 435 F.2d, *supra*, at 793-794.

As the dissent articulated in *United States v. Pohlman*, 522 F.2d 974, 980 (8th Cir. 1974),:

"The jury could have believed the reason Ms. Pohlman gave for failing to file. . . a reason which negates *mens rea*, and yet have found her guilty. Their verdict could have resulted from a belief that, although the defendant's excuse was the reason, it was not justifiable under the law. The statute plainly requires more."

The obligation of the Court to give adequate, articulate and clear conceptions of the boundaries of the term "willful" in a case as close as this one, and the failure to do so constitutes reversible error.

For all of these reasons, appellant Iversen's judgment of conviction should be reversed and a new trial should be granted.

POINT III

THE COURT'S THREE MONTH PRISON SENTENCE WAS ARBITRARY, CAPRICIOUS AND AN ABUSE OF DISCRETION AND DEPRIVED IRVIN V. IVERSEN OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW.

A glaring mistake was committed by the trial court at sentencing when, in complete disregard of Iversen's background, the fact he had an unblemished record, the nature of the case and the circumstances of the prosecution, the Court nonetheless sentenced him to three months imprisonment.⁴

We will not set out here all of the details of Irvin Iversen's life. They are sufficiently covered in the Statement of Facts.

The sentence of three months confinement imposed in this case was arbitrary, capricious and excessive--a clear abuse of discretion--as it failed to consider the individual circumstances of the defendant in this case and therefore, must be vacated or, in the alternative, modified.

At sentencing the trial judge stated that Iversen had no need for rehabilitation and was in no way a danger to the community. Thus, the judge stated:

"I have a complete assurance in my mind that whatever happens here today, . . . that you are not going to be in repetition of this or any

⁴ The challenging of this excessive sentence is in no way intended to detract from the legal arguments made in this brief which invalidate the conviction. Because of the insufferable sentence imposed upon Irvin V. Iversen, we are obliged to challenge its propriety.

comparable criminal activity. In my heart I know that is so." (S. 9).

The judge then referred to the circumstances of the case and the fact that he believed Iversen's situation was not based upon any intention not to file, but was a result of procrastination and inadequate record keeping which "doesn't quite fall within the realm of criminality or criminal intent." (S. 9).

Nonetheless the Court imposed the three month sentence after explaining that:

"[Y]ou do know that Congress has placed a punishment for this particular criminal act. . .and Congress obviously does that with the idea that having that punishment on the books is going to act as some deterrent to keep people from failing to file their income tax returns." (S. 10-11).

The sole use of the deterrent rationale to justify the sentence here conflicts with the basic theory of "individualization" of sentences. The American Bar Association has noted in this regard:

"The sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant." ⁵

The Supreme Court has definitively stated:

"The belief no longer prevails that every offense in a like legal category calls for an identical punishment

⁵ABA Standards Relating to Sentencing Alternatives and Procedures, (Standard 2.2), 1968.

without regard to the past life and habits of a particular offender." *Williams v. New York*, 337 U.S. 241, 247 (1949).

Numerous and influential authorities have determined that individualized sentences are required if punishment is to fit the criminal as well as the crime. We hold that the Court's arbitrary choice that this defendant be incarcerated flies in the face of the body of writing and thought on the philosophy of sentencing and demands review by this Court.

With respect to this defendant and the need for individualization, the trial judge noted:

"I am very sympathetic with the fact you have been disbarred. I know the difficulty you are having and going to have getting your life re-oriented, getting yourself back into some working posture, some way where you can earn money and I know you do have hanging over your head these obligations to the Federal Government, . . . and I know further that you are not going to be able to get out from under the balance of your obligation, which will include penalties and interest, and I know that this will be something that you will be saddled with, and your family, both the family of yourself and your former wife, also you and your present wife, as you go through the years." (S. 11-12).

The imposition of prison sentences for violation of §7203 has been rare, both nationally and within the Western District of New York. According to the 1976 Annual Report of the Director, Administrative Office of the United States Courts,

73% of those convicted of violating provisions of the Internal Revenue Code received probation in 1976, and of a total of 280 sentenced in 1976, only 69 were sentenced to incarceration.

In the Western District of New York, in the last 5 years, imprisonment has been imposed only once before the present case.⁶

The general infrequency of punishment by confinement for this particular offense suggests that only those requiring such confinement, either for rehabilitation purposes or the protection of the community, should be sentenced to prison. Clearly, the judge here determined to make an example of Iversen in order to reinforce the deterrent aspects of the statute. There is no adequate justification for this sentence when one examines the individual involved. The judge himself admitted this.

Iversen had never been convicted of a crime. He was a practicing attorney for many years. He was active in church, charitable and civic affairs. The absence of a single justification for imprisonment based on the individual, combined with a great infrequency of imposition of prison sentences for this crime points to a manifold disparity.

Iversen has filed his returns, including those no longer due by virtue of the statute of limitations. He has begun repayment of the sums due. It is clear that it is not his

⁶The defendant in that case was a notorious drug peddler and the judge looked to the individual circumstances to ascertain the appropriate punishment. See Appendix, at A- 8, *infra*.

negligent book and record keeping which is being punished. All that is being used to justify this punishment is that Congress determined that a possible one year term might deter future violators of this statute. We can see no reasonable explanation for the decision to impose a serious jail sentence on one so undeserving of serious punishment. Clearly, the singling out of Irvin Iversen is unjust.

This Court has seen fit to review sentences imposed by trial judges in a variety of situations. In fact, it has shown considerable latitude in its willingness to examine the exercise of a judge's discretion in this regard.

Most recently, in *United States v. Schwarz*, 500 F.2d 1350 (2d Cir. 1974), this Court vacated a four year sentence imposed on a first offender for a violation of 18 U.S.C. §4208 (a)(2). In its substantial review of the sentence, this Court concluded that the lower Court "employed a fixed and mechanical approach in imposing sentence rather than a careful appraisal of the variable components relevant to the sentence upon an individual basis" (500 F.2d at 1352). The statement by the trial judge inferred that the defendant's college education and "privileged" background were used by the judge to give a heavier sentence than one under the Youth Corrections Act, to which she was entitled. The failure to individualize the sentence meted out required an invalidation. See also *United States v. Baker*, 487 F.2d 360 (2d Cir. 1973); *United States v. Brown*, 470 F.2d 285 (2d Cir. 1972); *United States v. Holder*, 412 F.2d 212 (2d Cir. 1969).

The Eighth Circuit took a clear stand in favor of limited appellate review in *Woosley v. United States*, 428 F.2d 139 (8th Cir. 1973). In that case the Court articulated a position taken by numerous authorities--that the discretion allowed a trial judge in sentencing is unequaled in scope in the entire judicial process. One man's determination has extraordinary power over another's, and yet is seemingly immune from review.

This Circuit has clearly rejected the notion of unchecked power of the trial judge. At a symposium of the Judicial Conference of the United States Court of Appeals for the Second Circuit (32 F.R.D. 249, 1962), a large majority of justices from this Circuit favored some sort of sentencing review.⁷

The Supreme Court has endorsed limited appellate review of sentencing in *Dorszynski v. United States*, 418 U.S. 424 (1973), where it stated that such review was permissible in the absence of any discretion by the trial judge.

In view of the foregoing we urge that the Court carefully examine the sentence imposed on Irvin Iversen. Having branded him a criminal, we must ask how much more suffering he should be made to endure under a civilized system of justice. Putting him in prison would certainly accomplish no purpose. For history has taught us that the deterrent feature of this form of punishment is questionable at best and probably non-existent.

For all these reasons, it is most respectfully urged that Irvin Iversen's sentence be vacated or, in the alternative, modified.

⁷ The ABA has also endorsed such review. Standards Relating to Appellate Review of Sentences, 1.1(a).

CONCLUSION

The Court is respectfully requested to reverse the judgment of conviction and dismiss the indictment and to grant such other and further relief as to the Court appears just and proper.

Respectfully submitted,

DOYLE, DIEBOLD, BERMINGHAM,
GORMAN & BROWN
Attorneys for Appellant
Office and Post Office Address
1340 Statler Hilton Hotel
Buffalo, New York 14202

MICHAEL J. BROWN, ESQ., of Counsel

APPENDIX

TABLE OF CONTENTS

	<u>Page</u>
Relevant Docket Entries.	A-2
Defendant's Requests to Charge	A-5
Survey of Sentences Imposed for Similar Violations in the Western District of New York from 1972 through 1976	A-7

RELEVANT DOCKET ENTRIES

<u>Date</u>	
04/26/76	Filed Information.
05/18/76	P.B.M. (Proceedings Before Magistrate) - Defendant pled "not guilty". The Court directed that the Attorneys meet by 06/11/76 for voluntary discovery. Motions are to be filed by 06/14/76; the Government is to respond by 06/18/76; and argument is scheduled for 06/22/76; Defendant released on his own recognizance.
06/22/76	P.B.M. - Adjourned to 06/29/76 for status report. If motions are filed they are to be returned 6/29/76. Delay to be charged to defendant.
06/29/76	Adjourned to 07/7/76 for Status report as to completion of discovery. Government's response to defendant's pre-trial discovery requests.
07/7/76	P.B.M. - Mr. Fronk advised the Court that the Government's response is being filed today. Adjourned to 07/13/76 for Status report.
12/3/76	Filed Government's supplemental response to pre-trial discovery motions.
12/7/76	Government moves case to trial before Judge Elfvin, at Buffalo, New York; Jury is selected; Court directed Trial to begin at 9:00 A.M. on 12/9/76.
12/9/76	Jury Enters and is sworn - Witnesses testify. Trial is adjourned 12/10/76, Jury leaves.
12/10/76	Trial continues from yesterday with same appearances - Trial adjourned.
12/14/76	Trial continues from 12/10/76 - Jury retires to deliberate upon their verdict; Jury to return on 12/15/76 to resume deliberation.

RELEVANT DOCKET ENTRIES
(cont.)

<u>Date</u>	
12/15/76	Jury resumes deliberation - Jury reports a verdict of guilty on all three counts; sentencing set for 2:00 P.M. on 01/24/77; Bail continued as previously set. Motions against the verdict by defendant are to be returnable at 2:00 P.M. on 12/27/76.
12/20/76	Filed Defendant's Notice of Motion for an Order setting aside the Jury verdict, etc., returnable 12/27/76 at 2:00 P.M.
12/27/76	Motions - adjourned to 1/3/77.
01/6/77	Argument on Defendant's motion against the Jury Verdict, Decision Reserved.
02/28/77	Court denies motion by Defendant against the verdict. Court sentenced Defendant on each count to the custody of the Attorney General for ninety days, sentences to be concurrent, no fine is imposed. Court allowed Defendant to remain out of custody on recognizance but Defendant is directed to report to the Marshal when place of confinement is designated. Elfvin, J.; Court directed Defendant to make motion for reduction of verdict on 03/14/77.
03/1/77	Filed Defendant's Notice of Appeal.
03/2/77	Filed Defendant's Notice of Motion for a reduction of sentence, etc., returnable 03/14/77.
03/10/77	Defendant's Notice of Appeal mailed to Government, and the CCA with statement of docket entries.
03/28/77	Filed Court Steno's minutes of 02/28/77 before Hon. John T. Elfvin. Filed substitution of attorney. Argument on motion to reduce sentence, reserved decision; permits Defendant to remain out of custody pending Appeal.

RELEVANT DOCKET ENTRIES
(cont.)

<u>Date</u>	
04/13/77	Filed Judgment and Order of probation.
04/14/77	Filed Order denying Defendant's motion for reduction of sentence. Elfvin, J.
05/6/77	Filed three volumes of trial transcripts.
05/10/77	Original pertinent papers, clerk's certificate, index to record on appeal, and docket entries mailed to CCA.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

U.S.A.

Plaintiff

-vs-

CR-76-56

IRVIN V. IVERSEN

Defendant

REQUESTS TO CHARGE

To sustain a conviction, defendant IRVIN V. IVERSEN, must have been a person required to make a return, and his failure to make a return must have been willful. (U.S. v. McCormick, 67 F (24) 867)

In prosecution under this Section, the Government must establish beyond a reasonable doubt that defendant was required to file a return, that he knew he was so required, and that he willfully or purposefully, as distinguished from inadvertently, negligently or mistakenly, failed to file such a return. (U.S. v. Matosky, 421 F 2d 410)

To constitute willful failure to file tax returns there must be "bad purpose or evil motive" to violate the law. (U.S. v. Pohlman, 1975, CA8, USTC Section 9228)

If you find the defendant, IRVIN V. IVERSEN, was extremely negligent of any responsibility involving paper work or record

keeping, you are entitled to find the Government has failed to prove beyond a reasonable doubt that the defendant willfully filed his income tax returns for three consecutive years. (U.S. v. Berg, 1974, Dcsd, 75-1 USTC Section 9198)

In order to convict of any count in the information you must be satisfied beyond all reasonable doubt that the non-filing was willful, that is to say, that it was done with and for the intent and purpose of disobeying the law.

Willful means with bad intent.

In order to convict you must say beyond a reasonable doubt that the defendant had in mind the purpose of intentionally preventing the Government from receiving the returns.

You cannot convict of any of the offenses, if the failure to file was by reason of carelessness, inadvertence, negligence or even gross negligence.

You cannot convict of any of the offenses if the failure to file was brought about by circumstances out of the control of the defendant which prevented a filing. Evidence of good character, alone, in and of itself, if believed by you, may be sufficient to create a reasonable doubt, even in a case where without such testimony none would otherwise exist.

Respectfully submitted,

F. BERNARD HAMSHER
Attorney for the Defendant
Office and P.O. Address
930 Walbridge Building
Buffalo, New York 14202

SURVEY OF SENTENCES
IMPOSED FOR SIMILAR VIOLATIONS
IN THE
WESTERN DISTRICT OF NEW YORK
FROM
1972 THROUGH 1976

<u>Docket No.</u>	<u>Sentence</u>
1972-32	\$3,000.00 fine
1972-57	3 years probation; \$2,500.00 fine
1972-138	\$2,000.00 fine
1973-133	2 years probation; \$10,000.00 fine
1973-140	1 year probation (without supervision)
1973-147	1 year probation; \$500.00 fine
1973-165	\$1,500.00 fine
1973-166	1 year probation
1973-182	3 years probation
1973-275	1 year probation; \$2,000.00 fine
1973-304	3 years probation; \$2,000.00 fine
1973-334	\$500.00 fine
1973-363	\$4,500.00 fine
1973-374	\$1,000.00 fine
1974-47	1 year probation; \$500.00 fine
1974-118	3 years probation
1974-120	2 years probation; \$5,000.00 fine
1974-146	3 years probation
1974-241	1 year probation
1974-246	\$50.00 fine
1974-259	2 years probation
1974-315	2 years probation

<u>Docket No.</u>	<u>Sentence</u>
1975-1	\$600.00 fine
1975-4	\$500.00 fine
1975-8	3 years probation
1975-30	\$1,000.00 fine
1975-51	1 year probation
1975-66	2 years probation
1975-68	1 year probation; \$1,000.00 fine
1975-96	3 years probation; \$2,000.00 fine
1975-128	2 years probation; \$500.00 fine
1975-155	\$750.00 fine
1975-199	\$5,000.00 fine
1975-214	1 year probation
1976-9	6 months probation
1976-35	\$3,000.00 fine
1976-50	1 year custody of Attorney General
1976-52	3 years probation; \$1,500.00 fine
1976-172	\$3,500.00 fine

In the UNITED STATES COURT OF APPEALS
for the SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee

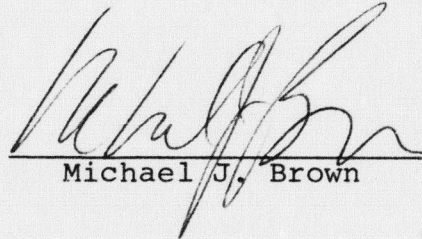
-v-

IRVIN V. IVERSEN,
Appellant

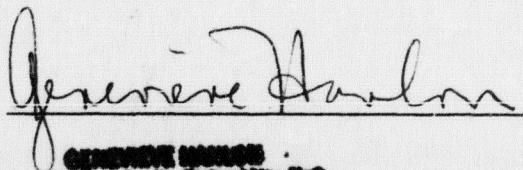
STATE OF NEW YORK)
COUNTY OF ERIE) ss:
CITY OF BUFFALO)

MICHAEL J. BROWN, being duly sworn, deposes and says:

That on the 23rd day of June, 1977, at the United States Courthouse in the City of Buffalo, New York, deponent served upon the United States Attorney for the Western District of New York, two (2) copies of the Appellant's Brief and Appendix herein, by delivering said papers to the offices of the United States Attorney at the United States Courthouse.


Michael J. Brown

Sworn to before me this
23rd day of June, 1977.



GENEVIEVE HOULTON
Notary Public, State of New York,
Qualified in New York
My Commission Expires March 29, 1979

